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Litigation Update

This article will examine two recently decided cases of interest to the construction industry.

A recent decision by the Federal Fourth Circuit Court of Appeals in the case of *Harbor Court Associates v. Leo A. Daly Company*¹ again underscores the importance of using AIA documents. The architect was sued several years after completion of the project and argued that it was too late to sue him because the statute of limitations had expired.

The parties had used a prior version of a standard AIA agreement with language similar to that found in the 1997 version of AIA Document B141 at Paragraph 1.3.7.3:

1.3.7.3 Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for Payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Architect's services are substantially completed.

Construction on the project, a combination office tower, hotel and garage located in Baltimore, started in mid-1984, and a final Certificate of Completion was issued on September 11, 1987. Other than some minor chipping and cracking of the outer brick veneer, no problems appeared until April, 1996 when a fifteen-square-foot section of brick suddenly and without warning, exploded off the face of the structure. The consulting engineers concluded that the structure suffered from fundamental and latent defects in design and construction.

In the resulting lawsuit, the defendant architect moved for summary judgment based on the AIA language and the fact that Maryland had a three-year statute of limitations. The plaintiff argued

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that the “discovery rule” should apply whereby the statute of limitations does not start to run until a defect is discovered. The federal court, however, held that the parties can contractually set their own rule that departs from the discovery rule, and that the AIA clause did just that. If the discovery rule had applied, the statute of limitations would not even start to run until the owner either knew or should have known that there was a problem. In this case, that would probably have meant that the three-year period would have started in April of 1996, thus permitting the architect to be sued. Instead, the court found that the three-year period started on the date of substantial completion and ended three years later, in September of 1990. It did not matter that the owner did not know that there was a problem or that the problem was hidden.

The lesson to be learned is that architects and contractors should use language such as that found in the AIA Agreements to limit the time period within which they may be sued. It is also important that a Certificate of Substantial Completion be issued at the proper time.

*Gunthorp v. Golan*² established that architects may, in some instances, be considered subcontractors. In that case, the Gunthorps interviewed architect Charles Page to design a home for them. After receiving a four page brochure that included plans and elevations of a Country French home, the Gunthorps decided that Page was too expensive. They then contacted a builder who, in turn, hired Golan, an architect who had often worked for the builder. The Gunthorps gave Golan magazine clippings, photos, and the first three pages of the Page brochure, minus Page’s photograph and identifying information. They never told the builder or Golan of their meetings with Page or indicated that they wanted a copy of Page’s design. Golan prepared plans based on the Gunthorps’ wishes and the builder paid him.

After construction started, Page filed a copyright infringement action against the Gunthorps and various other entities, stopping the construction. The Gunthorps promptly settled with Page, and construction on the home continued after some changes were made to the plans by another architect at the direction of Page. The builder had the Gunthorps sign a change order for the modifications that included a general release of the builder and its subcontractors. Thereafter, the Gunthorps sued Golan, alleging that they were the third party beneficiaries of the builder-architect contract and that Golan had breached the contract by designing an unbuildable house. Among other defenses, Golan argued that he was released

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because he was a subcontractor of the builder. The Gunthorps argued that Golan, as the architect, was not a “subcontractor” within the meaning of the release.

The court held for Golan, finding that he was, indeed, a subcontractor of the builder since the builder paid his fees. Although not styled as a design-build contract, that is really what this was. Architects who are hired by a contractor are subcontractors of the contractor in the eyes of the law. When the builder and owner signed a release that included the subcontractors of the builder, the architect was included.

Whenever preparing any release document, the parties should consider actually naming all of the parties to be released, as opposed to naming classes of parties. For instance, naming “ABC Construction, Inc.” is preferable to “the carpentry subcontractor.” spelling out the released parties will help to avoid possible ambiguities.

Contracts should always state that third parties have no rights under the contract in order to avoid being exposed to a third party beneficiary lawsuit such as occurred in *Gunthorp*. Standard AIA Agreements contain language, such as the following clause found in the 1997 version of AIA Document B141:

1.3.7.5 Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the Owner or Architect.

Using language such as this in construction agreements is an important element in minimizing liability of the parties. This applies to the contractors and owner as well as the design professional.

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1. 1999 U.S. App. LEXIS 11265, decided June 3, 1999.
2. 704 N.E.2d 370 (Ill. 1998).

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